Mayban Finance Bhd v Otahulu Industries (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3-22–63 OF 1998
MOHD HISHAMUDIN J
22 JANUARY 2008

Tort — Defamation — Defamatory statements — Conspiracy to injure — Forged signatures on guarantee — Loan granted to third party — Whether suit amounted to conspiracy to injure

Tort — Defamation — Defamatory statements — Guarantors — Forged documents — Name blacklisted in financial information system — Whether defendant prima facie a defaulting borrower — Whether plaintiff bank liable for defamation

Sometime in year 1997, the third and fourth defendants received a notice of demand from the plaintiff alleging that they were guarantors for a loan granted by the plaintiff to the first defendant. Upon verification of the alleged guarantee in the plaintiff's office, the third and fourth defendant protested and informed the bank officer that their signatures on the documents were forgeries. The plaintiff took no action to investigate but instead, initiated this suit against the defendants to recover the loan granted to the first defendant. In the statement of claim, the third and fourth defendants were said to be the guarantors of the loan and the plaintiff claimed from them for the repayment of the same. The third and fourth defendants counterclaimed for negligence and conspiracy to injure. The third defendant also counterclaimed for defamation.

Held, allowing the third and fourth defendants' counterclaim with costs:

(1) It was an agreed fact that the signatures on the hire purchase agreement, alleged to be that of the third and fourth defendants, were forgeries. It was also an agreed fact that the plaintiff had entered the third defendant's name in the financial information system ('FIS'). It was defamatory to the third defendant for the plaintiff to supply the third defendant's particulars to the FIS because the financial community regarded such information to mean that the third defendant was prima

facie a defaulting borrower; whereas the truth was that the third defendant was neither a borrower nor a guarantor (see paras 7–8 & 27).

(2) There was a conspiracy between the plaintiff and a third party to make use of the forged signatures of the third and fourth defendants. The guarantee form that contained the forged signatures of the third defendant and fourth defendants was throughout in the possession of the plaintiff bank. Based on the forged signatures, the plaintiff had approved a loan to a third party and had released the money; and the third party had defaulted in the repayment. It was on the basis of the forged signatures that the plaintiff filed the present civil suit against the third and fourth defendants (see para 28).

[Bahasa Malaysia summary

Sekitar tahun 1997, defendan ketiga dan keempat menerima satu notis tuntutan dari plaintif menyatakan mereka adalah penjamin untuk satu pinjaman yang diluluskan oleh plaintif kepada defendan pertama. Setelah mengesahkan gerenti yang didakwa tersebut di pejabat plaintif, defendan-defendan ketiga dan keempat membantah dan memberitahu pegawai bank bahawa tandatangan mereka atas dokumen tersebut adalah palsu. Plaintif tidak mengambil sebarang tindakan untuk menyiasat tetapi sebaliknya, memulakan guaman ini terhadap defendan-defendan untuk mendapatkan balik pinjaman yang telah diberikan kepada defendan pertama. Dalam penyataan tuntutan, defendan-defendan dikatakan penjamin kepada pinjaman itu dan plaintif menuntut daripada mereka untuk pembayaran balik yang sama. Defendan-defendan ketiga dan keempat menuntut balas untuk kecuaian dan pengkomplotan untuk memburukkan nama. Defendan ketiga juga menuntut balas kerana fitnah.

Diputuskan, membenarkan tuntutan balas defendan-defendan ketiga dan keempat dengan kos:

(1) Dalam perbicaraan tuntutan balas, ia adalah fakta yang dipersetujui bahawa tandatangan-tandatangan pada perjanjian sewa beli itu, yang dikatakan defendan-defendan ketiga dan keempat, adalah palsu. Ia juga fakta yang dipersetujui bahawa plaintif telah memasukkan nama defendan ketiga dalam sistem maklumat kewangan ('SMK'). Adalah menjadi fitnah untuk defendan ketiga sekiranya plaintif membekalkan butir-butir defendan ketiga kepada SMK. Ia menjadi fitnah kerana komuniti kewangan akan menganggap informasi tersebut bermakna defendan ketiga adalah prima facie peminjam ingkar, sedangkan sebenarnya defendan ketiga bukan peminjam mahupun penjamin (lihat perenggan 7–8 & 27).

(2) Terdapat satu pengkomplotan di antara plaintif dan pihak ketiga untuk menggunakan tandatangan palsu defendan ketiga dan keempat. Borang jaminan yang mengandungi tandatangan palsu defendan ketiga dan keempat adalah selama ini dalam simpanan bank plaintif. Berdasarkan tandatangan palsu tersebut, plaintif telah meluluskan satu pinjaman kepada pihak ketiga dan telah memberikan wang tersebut, dan pihak ketiga telah gagal membuat pembayaran balik. Adalah berdasarkan tandatangan palsu ini plaintif memfailkan guaman sivil ini terhadap defendan-defendan ketiga dan keempat (lihat perenggan 28).]

Notes

For a case on conspiracy to injure generally, see 12 *Mallal's Digest*, (4th Ed, 2005 Reissue) paras 80–82.

For cases on defamatory statements, see 12 *Mallal's Digest*, (4th Ed, 2005 Reissue) paras 301–305.

Haniza Abdul Rani (Aziz Zakaria, Shaiful & Wan) for the plaintiff.
Yusfarizal Yussof (Ahmad Edham with him) (Zulpadli & Edham) for the third and fourth defendants.

Mohd Hishamudin J:

[1] This trial concerns a counterclaim by the third and fourth defendants against the plaintiff.

[2] Earlier, on 5 June 2003, the plaintiff's suit against the third and fourth defendants was withdrawn with costs awarded to the defendants.

[3] The third and fourth defendants are counterclaiming for alleged negligence and conspiracy to injure.

[4] The third defendant is also counterclaiming for defamation.

[5] The trial began with the defendants giving evidence. At the conclusion of the defendant's case in the counterclaim, the plaintiff offered no evidence. In fact the plaintiff and their counsel were absent on 18 September 2006 for the continued hearing. On this date, counsel for the plaintiff was supposed to continue with her cross-examination of the third defendant ('DW1'). But she was absent and so was the representative of the plaintiff bank. As learned counsel for the defendants did not intend to re-examine DW1, the next witness for the defendants was called and that was the fourth defendant ('DW2').

[6] At the end of the trial, having considered the evidence and submissions, I gave judgment for the defendants. I found the plaintiff liable for defamation and conspiracy to injure. I awarded damages to the third and fourth defendants.

[7] It is an agreed fact that the signature in the hire purchase agreement, alleged to be that of the third defendant, is a forgery. It is an agreed fact that the plaintiff had entered the third defendant's name in the financial information system ('FIS').

[8] It is an agreed fact that the signature in the hire purchase agreement, alleged to be that of the fourth defendant, is a forgery.

[9] The third defendant is a dental specialist practising at a private hospital known as the Damansara Specialist Centre at Damansara Utama, Petaling Jaya. At the invitation of the second defendant, he became a shareholder and director of the first defendant company, Otahulu Industries (M) Sdn Bhd ('Otahulu'), a company dealing with the manufacturing of dental equipments. The other defendants were also shareholders of Otahulu and their respective shareholdings were as follows:

(i) second defendant — 31%;

(ii) third defendant – 10%;

(iii) fourth defendant — 10%;

(iv) fifth defendant — 49%.

[10] On 2 February 1996, the third and fourth defendants made up their mind to resign as directors of Otahulu, following a dispute among the directors of the company over a company resolution and regarding the fifth defendant's role in the company. So, they drafted a letter of resignation dated 2 February 1996 (exh D3); however, they did not tender their resignation that day.

[11] On the following day, 3 February 1996, the third defendant, together with the fourth defendant, went to plaintiff's branch office at Medan Tuanku, Kuala Lumpur, to inquire about the status of Otahulu's loan with the plaintiff bank. They were informed by a credit officer of the bank in charge of the first defendant's loan that the third and the fourth defendants were not named as guarantors of the loan. The third and fourth defendants felt relieved knowing that they were not guarantors. However, upon examining the bank's file on the loan, the third and fourth defendants, to their surprise, discovered that the file contained only a single document. After repeated requests, the bank officer supplied the third and fourth defendants with a photocopy of that

document, that is, exh D2. D2 is a blank hire purchase guarantee form (containing the standard provisions) with the name, address and phone numbers of the first defendant company stamped at the bottom left hand side of the document where the words 'SIGNATURE OF GUARANTOR' appear. And there is a signature written over the stamped words.

[12] Then two days later, on 5 February 1996, the third and fourth defendants attended a board of directors' meeting of the first defendant company. Also present were the other directors of Otahulu, namely, the second and fifth defendants. The meeting was held at the fifth defendant's office. At this meeting, the fifth defendant informed the other directors/defendants that she intended to have complete control over the company. The third and fourth defendants disagreed with the proposal and, as a mark of protest, tendered their resignation.

[13] Almost two years later, in November 1997 the third defendant received a notice of demand dated 20 November 1997 from the plaintiff bank alleging that the third defendant was a guarantor for Otahulu's loan with the plaintiff, and demanding that the third defendant, as a guarantor, settled the said loan. The third defendant went again to the same branch office of the plaintiff and there he was shown by an officer of the bank a copy of the guarantee agreement form allegedly signed by him on 26 January 1996. He was advised to repay the loan given to Otahulu. The signature, however, was a forgery. When the third defendant protested saying that it was a forgery, he was asked to see an officer of the plaintiff, one Encik Fazli bin Abu Hassan, who allegedly had witnessed the signature of the third defendant. And the said Encik Fazli, however, confirmed that he had never seen the third defendant before. In spite of this, the bank officer was not sympathetic and instead he told the third defendant that his name had been 'blacklisted' in the FIS. The bank officer also told him repeatedly, 'See you in court' and 'We always win'.

[14] On 10 December 1997, the third defendant lodged a police report regarding the forgery. He was investigated by the police for a few days, and samples of his signatures were taken.

[15] After lodging the report, he then went to the plaintiff's office requesting the plaintiff to defer inserting his name in the FIS until the police completed their investigation. Unfortunately this request was turned down by the plaintiff.

[16] Subsequently the third defendant was served with a writ summons by the plaintiff. The statement of claim alleges that the third defendant (together with the fourth defendant) had breached a guarantee agreement. In the

A statement of claim the plaintiff claimed from the third and fourth defendants for the repayment of the sum loaned to Otahulu.

[17] Some time in the middle of 1998 the third defendant applied for a loan from RHB Bank for the purpose of upgrading his clinic but was B informed by the bank officer that his name had been 'blacklisted' as his name had appeared in the FIS. As a consequence of his name appearing in the FIS, the defendant was unable to obtain the loan.

C **[18]** The third defendant once again went to the plaintiff's branch office and there an officer by the name Mohamad Shamsul Azahar bin Abu Bakar confirmed to the third defendant that his name was indeed already in the FIS.

[19] Subsequently the third defendant went to Credit Corporation D Malaysia ('CCM') to inquire about his status, as his company, Bumi Dental Suppiers SDn Bhd, in which he was a director, had taken a loan from CCM for the purchase of a vehicle. There he met an officer who checked the FIS and the officer confirmed that the third defendant's name had been 'blacklisted' because of the unsettled Otahulu loan and his position as a E 'guarantor' with the plaintiff bank. The officer gave him a copy of the FIS computer printout ('exh D6').

[20] Now, financial institutions utilise the services of the FIS. It is the practice among financial institutions that before a loan is approved the F financial institution in question will check with the FIS in order to know the credit standing of the loan applicant. When a person's name is listed in the FIS, he is considered prima facie a loan defaulter and unworthy of credit, and financial institutions will decline his loan application. In other words, there is a stigma on the person once his name is listed in the FIS.

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[21] Now, turning to the fourth defendant, in December 1997 she received a notice of demand dated 20 November 1997 from the plaintiff demanding the former to make a repayment of more than RM700,000 to the plaintiff, allegedly as a guarantor of a loan taken by Otahulu who had defaulted. H The fourth defendant was shocked by this letter as she had never signed as a guarantor in respect of the first defendant's loan with the plaintiff.

[22] The fourth defendant immediately went to the plaintiff's branch office, and there a bank officer gave her a photocopy of a two-page document I dated 26 January 1996. She was shocked to see that the document contained

a forged signature of hers. She complained to the officer about the forgery, but the unexpected reply that she got from the officer was:

> See you in court!

[23] Subsequently, through her contacts the fourth defendant managed to get from the fifth defendant's office three documents. The first document is a six-page letter of offer dated 21 August 1995 signed by an assistant general manager of the plaintiff bank addressed to the Executive Chairman of Otahulu offering a loan of RM1m to Otahulu. The second document is a Malayan Banking cheque for RM180,000 dated 21 August 1995 issued in favour of a foreign company called as 'Zarnavaz Co Ltd'. The third document is a Malayan Banking cheque for RM100,000 dated 21 August 1995 issued by the plaintiff's Medan Tuanku branch in favour of the fifth defendant.

[24] On 13 December 1997 the fourth defendant lodged a police report regarding the forgery. Like the third defendant, the fourth defendant too was sued by the plaintiff for breach of a guarantee agreement pertaining to Otahulu's loan.

[25] The defendants' third witness ('DW3'), namely, Ms Lim Swee Lian, the Senior Manager of Financial Information Services Sdn Bhd, provides the court with information regarding the FIS. In her evidence she said her company operates the FIS. It is an online (computerised) system. According to her only 'members' have access to the information provided by FIS. By 'members' she meant financial institutions, including hire purchase companies. The company had 400 members subscribing to the services (FIS). The plaintiff, according to Ms Lim, is a member. The members feed into the system with information on their respective borrowers. This information in turn is shared by the members. Before a member approves a loan application, the member will check with the FIS to ascertain as to whether the applicant's name is listed by the FIS. If his name is listed then the applicant will prima facie be considered to be a defaulting borrower. DW3 confirmed that the plaintiff did supply the third defendant's name to FIS. DW3 also confirmed that the information pertaining to the third defendant's 'loan' status vis-à-vis the plaintiff bank, as contained in the computer printout exh D6, came from the FIS. On the status of the third defendant, exh D6 was shown to DW3. This is her evidence regarding the status of the third defendant:

> Q: What does this inquiry result tell about Dr Dzul Khaini bin Hj Husain, in relation to Mayban Finance, Medan Tuanku Branch?
>
> A: It is just a general reference result asking the inquirer to clarify Dr Dzul's status with Mayban Finance, Medan Tuanku branch.
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> Q: Does this inquiry result indicate that Dr Dzul is a non-performing borrower?

A: On the surface, you can say that. But for clarification one still have to seek clarification from Mayban Finance.

Q: Is the word 'borrower' or 'guarantor' or any code to that (effect) shown in this document.

A: No.

Q: Then, how come you said earlier 'On the surface, you can say that'?

A: Generally our members are using general reference as for non-performing loan accounts. But they can also use it for other purposes.

[26] To my understanding, what witness is saying, in essence, is this: because the third defendant's name appears in the FIS, to the members of the FIS, the third defendant is prima facie a defaulting borrower.

[27] On the evidence, I am satisfied that the plaintiff is guilty of the tort of defamation in relation to the third defendant. It is defamatory to the third defendant for the plaintiff to supply the third defendant's particulars to the FIS. It is defamatory because the financial community will regard such information to mean that the third defendant is prima facie a defaulting borrower; whereas the truth is that the third defendant was neither a borrower nor a guarantor.

[28] On the evidence, there must have been a conspiracy between the plaintiff and a third party to make use of the forged signatures of the third and fourth defendants. The guarantee form that contained the forged signatures of the third defendant and fourth defendants was throughout in the possession of the plaintiff bank. Based on the forged signatures, the plaintiff had approved a loan to a third party and had released the money; and the third party had defaulted in the repayment. It was on the basis of the forged signature that the plaintiff filed the present civil suit against the third and fourth defendants. The plaintiff's officers did not show any sympathy to the third and fourth defendants when they came to the plaintiff's office and explained that the signature was forged. The bank officer arrogantly told them:

See you in court!

[29] I awarded damages in the sum of RM250,000 to the third defendant in respect of the tort of defamation. I awarded damages in the sum of RM150,00 each to the third and fourth defendants for the tort of conspiracy to injure.

[30] Judgment for the third and fourth defendants with costs.

Third and fourth defendants' counterclaim allowed with costs.

Reported by Brendan Navin Siva